IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

BRENDA HANKEN, Plaintiff, vs. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	No. C06-0163 **RULING ON REQUEST FOR JUDICIAL REVIEW**

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I. INTRODUCTION

This matter comes before the court on the Complaint (docket number 1) filed by Plaintiff Brenda M. Hanken on November 23, 2006, requesting judicial review of the Social Security Commissioner's decision to deny her application for Title II disability insurance benefits. Hanken asks the court to reverse the decision of the Social Security Commissioner ("Commissioner") and order the Commissioner to provide her disability insurance benefits. In the alternative, Hanken requests the court to remand this matter for further proceedings.

II. PRIOR PROCEEDINGS

Hanken applied for disability insurance benefits on December 30, 2004. In her application, Hanken alleged an inability to work since October 28, 2004 due to degenerative disc disease, sleep apnea, depression with anxiety, and personality disorder. On March 3, 2005, Hanken's application was denied. On June 30, 2005, her application was denied on reconsideration. On October 28, 2005, Hanken requested an administrative hearing before an Administrative Law Judge ("ALJ"). On March 14, 2006, Hanken appeared with counsel, via video conference, before ALJ John E. Sandbothe for an evidentiary hearing. Hanken, Thomas Cigrand, Hanken's former fiancé, and vocational expert Julie A. Svec testified at the administrative hearing. In a decision dated May 26, 2006, the ALJ denied Hanken's claim. The ALJ determined that Hanken was not disabled and was not entitled to disability insurance benefits because she was functionally capable of performing work that exists in significant numbers in the national economy. Hanken

appealed the ALJ's decision. On September 26, 2006, the Appeals Council denied Hanken's request for review. Consequently, the ALJ's May 26, 2006 decision was adopted as the Commissioner's final decision.

On November 23, 2006, Hanken filed this action for judicial review. The Commissioner filed an answer on April 6, 2007. On June 29, 2007, Hanken filed a brief arguing there is not substantial evidence in the record to support the ALJ's finding that she is not disabled and that there is other work she can perform. On September 4, 2007, the Commissioner filed a responsive brief arguing the ALJ's decision was correct and asking the court to affirm the ALJ's decision. Hanken filed a reply brief on September 14, 2007. On April 19, 2007, both parties consented to proceed before the undersigned in this matter pursuant to the provisions set forth in 28 U.S.C. § 636(c).

III. PRINCIPLES OF REVIEW

Title 42, United States Code, Section 405(g) provides that the Commissioner's final determination following an administrative hearing not to award disability insurance benefits is subject to judicial review. 42 U.S.C. § 405(g). 42 U.S.C. § 405(g) provides the court with the power to: "[E]nter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). "The findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . ." *Id*.

The court must consider "whether the ALJ's decision is supported by substantial evidence on the record as a whole." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005) (citing *Harris v. Barnhart*, 356 F.3d 926, 928 (8th Cir. 2004)). Evidence is "substantial evidence" if a reasonable person would find it adequate to support the ALJ's determination. *Id*. (citing *Sultan v. Barnhart*, 368 F.3d 857, 862 (8th Cir. 2004)). Furthermore, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Baldwin*

v. Barnhart, 349 F.3d 549, 555 (8th Cir. 2003) (quoting *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989), in turn quoting *Consolo v. Fed. Mar. Comm'n*, 282 U.S. 607, 620 (1966)).

In determining whether the ALJ's decision meets this standard, the court considers "all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence." *Vester*, 416 F.3d at 889 (citing *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005)). The court not only considers the evidence which supports the ALJ's decision, but also the evidence that detracts from his or her decision. *Guilliams*, 393 F.3d at 801. "[E]ven if inconsistent conclusions may be drawn from the evidence, the agency's decision will be upheld if it is supported by substantial evidence on the record as a whole." *Id*. (citing *Chamberlain v. Shalala*, 47 F.3d 1489, 1493 (8th Cir. 1995)).

IV. FACTS

A. Administrative Hearing Testimony

1. Hanken's Testimony

Hanken was born in 1962. She has earned several postsecondary degrees, including a B.A., M.A., and an educational specialist degree. She testified that prior to her alleged disability onset date of October 28, 2004, she worked for the Keith Stone Education Agency for fifteen years as an early childhood special education teacher consultant.[1]

Hanken testified that her daily routine consists of taking her children[2] to school, going grocery shopping, and starting the washer and dryer. She testified that she takes a nap everyday. She further testified that some days she sleeps all day, from 9:00 a.m. to 3:00 p.m., after taking her children to school. She testified that her children do most of the cooking, cleaning, laundry, and yardwork.

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[1] The record provides that Hanken worked for the Area Education Agency No. 1 of Iowa from 1990-2004. *See* Administrative Record at 73-74.

[2] At the time of the hearing, Hanken's son was 15 and her daughter was 11.

During the hearing, the ALJ asked Hanken several questions regarding tasks she was able to perform. The ALJ asked Hanken:

> Q: Well how much do you think you can lift on an occasional basis if you had to?
> A: Ten pounds, maybe fifteen.
> Q: A small bag of dog food is 20 pounds, could you lift a small bag of dog food?
> A: I'd have to struggle at it, but if I struggled I probably could at least lift it up.
> Q: Okay. How long can you sit in a work chair?
> A: That depends. . . . Sometimes I can sit for awhile and sometimes I can't, it depends on if that leg pain comes in or not.
> Q: How long is a while?
> A: Oh, sometimes I can sit an hour or longer, sometimes I'll sit down and have to get right back up.
> Q: How long can you stand, just be on your feet milling about?
> A: Probably, oh, probably an hour, somewhere in there. I can like sometimes mop my kitchen but I can only do half of it.
> Q: And how far can you walk at a time?
> A: It -- I'm not sure.
> Q: A guesstimate?
> A: Well --
> Q: A mile, five miles?
> A: Oh, I don't think I could even walk a mile maybe. If I was outside walking I could probably walk, oh, I don't know, . . . three or four blocks.

(Administrative Record at 586-87)

2. Thomas Cigrand's Testimony

Thomas Cigrand ("Cigrand") testified as a witness for Hanken at the March 14, 2006 administrative hearing. Cigrand is Hanken's former fiancé. Cigrand testified that he and Hanken had known each other for over twenty years and continued to be good friends. He testified that they were engaged to be married, but Hanken's mental health issues ended their engagement. Cigrand testified that Hanken suffers from "severe

depression" and has significant mood swings. Hanken's attorney asked Cigrand to describe Hanken's condition when it is at its worst:

> Q: Okay. What's the most severe you've seen her?
> A: I've seen her where she would just be bed ridden and --
> Q: Prolonged period of time?
> A: Prolonged periods of time, days at a time. And I've seen her where she would be, she would be upset to the point where she would be, you know, trembling all the time and having very, you know, degrading thoughts about herself.
> Q: Can she -- will she reason when she's in that stage?
> A: No.
> Q: And how does she get out of that?
> A: Usually it's just time, time, time has to pass by. And her medications of course.

(Administrative Record at 594)

3. Vocational Expert's Testimony

Vocational expert Julie Svec also testified at the March 14, 2006 hearing. The record provides the following examination of the vocational expert by the ALJ:

> Q: For this first hypothetical I'd limit [Hanken] as follows, she could lift 20 pounds occasionally, 10 pounds frequently; she could only occasionally balance, stoop, crouch, kneel, crawl or climb. She is able to do more than simple, routine, repetitive work but no close attention to detail. Only occasional contact with the public, no more than a regular pace. Past work?
>
> . . .
>
> A: I know she would not.
> Q: Any other jobs she might perform?
> A: Other jobs that would be possible under that hypothetical would include work as a file clerk . . . there are approximately 5,000 positions in this area, 275,000 nation wide. Another example would be work as a shipping checker . . . there are approximately 2,000 positions in this area, 400,000 nation wide. And

a third example would be that of an order filler . . . there are approximately 2,000 positions in this area, 400,000 nation wide.

Q: And those are all light and unskilled?

A: Those are light and semi-skilled.

Q: For this next hypothetical I'd have you consider the following . . . same limitations as before. However, in this instance I'm going to indicate that she's going to need a slow pace for at least one-third of the day, at least two absences per month. With those two additional limitations, competitively employable?

A: No, Your Honor.

Q: And would each in and of itself prohibit competitive employment?

A: Yes.

(Administrative Record at 596-97) Hanken's attorney also questioned the vocational expert. He provided the vocational expert with a hypothetical in which an individual would have the following limitations: (1) Difficulty carrying out short and simple instructions, (2) difficulty maintaining attention for two hour segments, (3) difficulty maintaining regular attendance and being punctual, (4) difficulty sustaining an ordinary routine without special supervision, (5) being distracted when working proximity to others, (6) difficulty keeping a consistent pace without an unreasonable number of breaks, (7) difficulty accepting instructions and responding appropriately to criticism from supervisors, and (8) difficulty dealing with normal work stress. The vocational expert determined that under those limitations, such an individual would be unable to work in any job.[3]

B. Hanken's Medical History

1. Hanken's Back Problems

On April 21, 2005, Hanken had an MRI on her back. Dr. Darren Davenport, M.D., reviewed the MRI and found disc dehydration at L3-4 and L5-S1. Dr. Davenport

[3] "I believe that the combination of all these items under that hypothetical would preclude competitive employment." *See* Administrative Record at 599.

noted a left lateral disc bulge at L3-4 causing narrowing of the left neural foramen. Dr. Davenport also identified minor disc bulges at L4-5 and L5-S1. Dr. Davenport concluded that Hanken had "[m]ultifocal changes of degenerative disc disease. . . . The most abnormal level is L3-4 on the left, where the left L3 nerve is contacted and displaced."[4]

On April 25, 2005, Hanken was examined by Dr. Abernathey, a neurosurgeon, for low back pain with radiation into the left lower extremity. Dr. Abernathey noted that Hanken presented "with a chronic history of low back pain and left leg pain. She states that her pain extends to her foot."[5] Dr. Abernathey found that an MRI of her lumbosacral spine showed left L3-4 far lateral disc extrusion. Dr. Abernathey discussed with Hanken the risks, goals, and alternatives of conservative management vs. surgical intervention for her back pain. Hanken elected to pursue the conservative approach for dealing with her back pain. Accordingly, Dr. Abernathey made arrangements for Hanken to undergo physical therapy as treatment for her back pain.

On July 18, 2005, Hanken was treated by Dr. Douglas T. Sedlacek for mid-to-low back pain, left and right hip pain, and left leg pain. Dr. Sedlacek diagnosed Hanken with L3-4 multilevel degenerative disc changes, longstanding low back pain, and possible left radicular pain. Dr. Sedlacek treated her back pain with an intralaminar epidural steroid block injection. On July 26, 2005, Hanken reported improvement in her back pain and satisfaction with the epidural steroid injection. On September 28, 2005, Hanken returned to Dr. Sedlacek for a second intralaminar epidural steroid block injection. Dr. Sedlacek noted that the previous epidural steroid injection had helped Hanken's pain for four to six weeks. On November 17, 2005, Hanken returned to Dr. Sedlacek for a third intralaminar epidural steroid block injection. Dr. Sedlacek noted that the second epidural steroid injection helped Hanken become more active and "picked up" her normal activity.

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[4] *See* Administrative Record at 342.

[5] *See* Administrative Record at 362.

According to Dr. Sedlacek, however, Hanken still experienced "significant" back pain which required the third epidural steroid injection.

2. Hanken's Sleep Problems

On July 24, 2004, Hanken was examined by Dr. Scott D. Geisler, M.D., for tiredness, troubles with memory and concentration, and falling asleep while driving. Dr. Geisler's examination notes contain a detailed history of Hanken's symptoms. Dr. Geisler's notes provide in pertinent part:

> [Hanken] has had troubles with insomnia and sleeping since the mid to early 1990's. This has worsened despite the addition of multiple sleeping aids including Trazodone, Sonata, Ambien, and Temazepam. She takes the last three on a fairly rotating basis depending on how much time she has left for sleep and whether she has had any alcohol that day or evening (on those days she has had alcohol, she will not take the Temazepam). Despite using all these medications, she continues to have worsening symptoms. She describes little energy, extreme fatigue, major problems driving including falling asleep at the wheel. She also describes poor concentration and focus and major memory problems. She is feeling extremely unorganized and not functioning well at work anymore. She is worried about losing her job. She also has some more physical complaints including headaches, joint stiffness and aches, as well as muscle weakness. . . . She does have problems with posttraumatic stress disorder and does suffer from nightmares, although that is not every night. She also describes an uncomfortable sensation in her legs periodically that is not most nights but at least several times a month, which feels slightly better if she stretches her arms and legs. This does prevent her from going to sleep and sometimes lasts all night. It has in fact waken her up in the middle of the night at times. . . . She does snore, she has had other people complain about her snoring. She does not awaken in the morning feeling refreshed, even after what should have been a good night's sleep. She does get sleepy during the day when things are quiet. . . . She denies ever being told that she has lots of arm or leg movements at night and no one has witnessed or described apnea spells during her

> sleep but she has been told that she has very labored breathing while sleeping.

(Administrative Record at 237) Dr. Geisler concluded that Hanken has excessive daytime somnolence. Dr. Geisler noted that excessive daytime somnolence can be caused by insomnia. Dr. Geisler determined that Hanken's insomnia is due, in part, to her psychiatric problems, including posttraumatic stress disorder, anxiety, and depression. Dr. Geisler suggested that Hanken stop using Sonata, Ambien, and Temazepam entirely as treatment for the excessive daytime somnolence. Dr. Geisler also concluded that Hanken might suffer from restless leg syndrome. However, Dr. Geisler determined that any treatment should wait until the results of a sleep study was conducted and she stopped using the sleeping medication.

On August 4, 2004, a sleep latency test was performed on Hanken during her normal waking hours. The test consisted of five nap periods throughout the day. Hanken fell asleep in four of the five periods. However, she was certain she had not fallen asleep during any of the naps. The results of the test were reviewed by Dr. Andrew C. Peterson. Dr. Peterson concluded that Hanken's sleep latencies were normal. Hanken underwent a second sleep test which involved a polygraph recording of her night-time sleep period. The test showed an abnormal polysomnogram with fragmented sleep. Hanken also had two brief clusters of leg jerks and supine apnea was observed. However, significant apnea was not present. Dr. Peterson determined that Hanken had chronic psychophysiological insomnia. Dr. Peterson recommended clinical correlation for Hanken's chronic insomnia and behavioral therapy.

On August 30, 2004, Hanken and Dr. Geisler discussed the results of her sleep study tests performed on August 4, 2004. In his progress notes, Dr. Geisler provided a detailed review of the test results:

> [The tests] show a sufficient amount of sleep, 419 minutes recorded, sleep efficiency of 79%, good distribution of sleep stages. REM sleep was significantly delayed at 236.5 minutes and there was some difficulty getting to sleep with sleep onset

> at 50 minutes. Most importantly, however, it does show obstructive sleep apnea with an overall index of 6.5 with supine index of 54.3. . . . Not much supine sleep was captured, only 21 minutes, so that is somewhat artificially elevated but still an indication of a significant problem during supine sleep. REM sleep was in the lateral position only and that index [was] only 3.4. Also identified were periodic limb movements elevated at 8.5 with only some of those affecting sleep.

(Administrative Record at 233) Dr. Peterson recommended that Hanken be treated with positional therapy and possibly a CPAP trial. Dr. Peterson also prescribed Requip for Hanken's periodic leg movement and suggested she stop taking two-hour naps during the daytime because they upset her sleep hygiene and schedule.

On December 4, 2004, Hanken had a follow-up visit with Dr. Geisler. Although Hanken noted "significant" improvement from her previous visits, she informed Dr. Geisler that she continued to have excessive daytime drowsiness, poor driving, slower processing, and poor sleep. Hanken also indicated that she was only getting two hours of sleep at a time and then would be awake for hours before falling back to sleep. Dr. Geisler noted that chronic hip pain might play a role in Hanken's sleeping problems. Dr. Geisler also noted that Hanken continued to have periodic leg movement in her sleep. Dr. Geisler's treatment plan consisted of prescribing a greater dosage of Requip to help Hanken's periodic leg movement and restless leg symptoms. Dr. Geisler also suggested that Hanken discuss her hip pain with her primary care physician, Dr. Phillip First, and consult a sleep counselor regarding her psychophysiological insomnia.

Hanken returned to Dr. Geisler on February 15, 2005 for another follow-up meeting regarding her sleep problems. Dr. Geisler noted that her periodic leg movement and restless leg symptoms had improved greatly with the higher dosage of medication. Dr. Geisler also noted that Hanken was no longer awakened at night with hip pain and was able to frequently sleep on her side. However, overall, Dr. Geisler determined that Hanken's sleep had not improved because she started taking Phentermine to control

significant weight gain which had occurred over several months.[6] Dr. Geisler concluded that:

> there are two remaining issues to address. One is the Phentermine. I know she needs to do something with her weight. She was already trying to increase her activity, which is tough given her fatigue, and also change her diet. Unfortunately, at this point, the Phentermine seems to be acting directly opposite the beneficial effects we are trying to work for with sleep at night in someone who is already prone to insomnia and restlessness. This particular drug may not be the best option. . . . Finally, I think we have reached the point where the last remaining factors to her sleep are related primarily to psychophysiological insomnia and for that reason I think she really does need to meet with one of the sleep counselors. She already carries a diagnosis of both depression and anxiety and certainly these ongoing sleep complaints make treating those disorders as well as her overall health that much tougher.

(Administrative Record at 287)

On February 23, 2005, Hanken met with Dr. Ronald G. Nelson, Ph.D., a licensed psychologist and sleep counselor. Dr. Nelson noted that Hanken's problems included restless leg syndrome, sleep apnea, and chronic insomnia. Hanken informed Dr. Nelson that she was sleeping 2.5 hours at night and would wake up 4 to 5 times per night. Dr. Nelson concluded that Hanken's sleep disturbance was partly related to depression and partly due to stress. Dr. Nelson's treatment plan consisted of cognitive-behavioral therapy to improve Hanken's sleep efficiency and duration. Hanken had counseling sessions with Dr. Nelson in March and April, 2005. Dr. Nelson's progress notes indicate that he and Hanken discussed various methods to improve her sleep and that her sleep improved after their weekly counseling sessions.[7]

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[6] A side effect of Phentermine is insomnia and restlessness.

[7] *See* Administrative Record at 334-37 (Dr. Nelson's "Progress" notes).

On May 10, 2005, Hanken visited Dr. Geisler for a follow-up appointment regarding her sleep issues. Dr. Geisler noted that Hanken's medication continued to alleviate her restless leg syndrome and periodic limb movement during her sleeping hours. Dr. Geisler also noted that Hanken's sleep counseling sessions with Dr. Nelson improved her quality of sleep. Hanken informed Dr. Geisler that she continued to wake up every two hours, however, she was able to get back to sleep more quickly and with greater ease. Because Hanken's sleeping improved, Dr. Geisler did not schedule any future follow-up appointments.

3. Hanken's Depressive Disorder

Beginning in 1999, Hanken was a patient of Dr. Thomas R. Anderegg, Ph.D., a licensed psychologist. In a review of his treatment for Hanken's depression, Dr. Anderegg found that her depression was characterized by fatigue, inability to concentrate, difficulty making decisions, crying periods, inability to sleep, excessive eating, and passive suicidal ideation. Dr. Anderegg also found that Hanken's primary psychosocial stressor was her difficult relationship with her former husband. Dr. Anderegg noted that Hanken found her husband to be "irresponsible, selfish, self-centered, and unreasonable. They had major disagreements in their life about how to spend their money, discipline their children, the importance of religion in their lives, and intimacy issues."[8] Dr. Anderegg further noted that, through counseling, Hanken realized that her former husband was both emotionally and sexually abusive.[9] Dr. Anderegg further found that Hanken had difficulty meeting the demands of her job due to problems with concentration and fatigue.

Hanken underwent outpatient occupational therapy at St. Luke's Hospital in Cedar Rapids, Iowa, from May 11, 2000 through August 10, 2000. She was diagnosed with a

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[8] *See* Administrative Record at 256.

[9] Dr. Anderegg further noted: "[Hanken] became aware of the fact that [her former husband] would often force sex on her at night after she had taken her medication and was not quite capable of making a conscious decision to participate." *See* Administrative Record at 256.

depressive disorder and poor sensory registration and modulation. At the time of Hanken's discharge from therapy, her occupational therapist, Melinda S. Shafer, provided the following assessment:

> [P]atient was able to independently implement all sensory diet activities that were introduced to her throughout her outpatient therapy sessions. She demonstrated increased efficiency and less anxiety both within the home and work setting. She was more motivated to engage in activities she might not have otherwise completed as she reports increased self-esteem and endurance in order to carry the activity out.

(Administrative Record at 187)

On November 1, 2004, Dr. Anderegg filled out an "Attending Physician's Statement" for Madison National Life, Hanken's disability insurer. In the statement, Dr. Anderegg diagnosed Hanken with major depressive disorder, moderate to severe. The statement provided that Hanken's symptoms included fatigue, feelings of being overwhelmed, and poor concentration. Dr. Anderegg also noted that Hanken's main obstacles to returning to work were vulnerability to stress and profound fatigue.

On January 14, 2005, in a letter to Disability Determination Services ("DDS"), Dr. Anderegg noted that over the past year, Hanken's level of depression diminished "greatly." However, Dr. Anderegg also found that Hanken had "significant" problems with inability to concentrate, fatigue, inability to regulate sleep, and problems with appetite. Dr. Anderegg concluded that "[i]n many regards, she is doing much better on a psychological basis but her ability to function in the work place has actually deteriorated." Dr. Anderegg diagnosed Hanken with major depressive disorder, posttraumatic stress disorder, dependent personality traits, thyroid dysfunction, restless leg syndrome, position sleep apnea, and chronic insomnia. Dr. Anderegg further concluded:

> [Hanken] is capable of remembering and understanding simple instructions, procedures, and locations. She would require some repetition in order to remember more complex instructions. She has moderate problems with attention and concentration that would make it difficult for her to carry out

> instructions. It also interferes with the pace of her work. She is vulnerable to stress and her ability to function decreases significantly when under even mild stress. She is capable of interacting appropriately with supervisors, co-workers, and the public. Her judgment is intact and she is able to respond appropriately to changes in the work place.

(Administrative Record at 257-58)

On February 28, 2005, Dr. Beverly Westra, Ph.D., provided DDS with a psychological functional capacity assessment based on a review of Hanken's records. Dr. Westra found that Hanken had mild limitations on restrictions of daily living and difficulties in maintaining social functioning. Dr. Westra found Hanken had moderate limitations on difficulties in maintaining concentration, persistence, or pace. Dr. Westra also determined that Hanken was moderately limited in her ability to: (1) understand and remember detailed instructions, (2) carry out detailed instructions, (3) maintain attention and concentration for extended periods, (4) complete a normal workday and workweek without interruptions from psychologically based symptoms, (5) perform at a consistent pace without an unreasonable number and length of rest periods, and (6) respond appropriately to changes in the work setting. Dr. Westra concluded:

> Evidence supports moderate restrictions for concentration and pace. [Hanken] would have moderate limitations with sustained attention to complex tasks and maintaining a steady pace. In other respects, however, functioning is broadly normal. Although moderate functional restrictions are supported, it is unlikely that these can be entirely attributed to her depression, which has improved over the last year. More likely a combination of her medical conditions is contributing. Evidence is consistent in supporting moderate restrictions. Allegations are credible to this extent.

(Administrative Record at 305)

On May 18, 2005, Dr. Anderegg provided Hanken's counsel with a mental impairment questionnaire regarding Hanken's mental functional capacity. Dr. Anderegg began treating Hanken, as her psychologist, in 1999 and over the past year had seen

Hanken twice monthly initially and then once per month when he filled out the questionnaire. Dr. Anderegg had previously diagnosed Hanken with major depressive disorder and posttraumatic stress disorder. Dr. Anderegg listed the following signs and symptoms of Hanken's depressive disorder: Appetite disturbance with weight change, decreased energy, generalized persistent anxiety, difficulty thinking or concentrating, easy distractability, memory impairment, and sleep disturbance. Dr. Anderegg also reported that Hanken was seriously limited but not precluded in maintaining attention for a two hour segment. Dr. Anderegg further found that Hanken was unable to meet competitive standards for completing a normal workday and workweek without interruptions from psychologically based symptoms, performing at a consistent pace without an unreasonable number and length of rest period, accepting instructions and responding appropriately to criticism from supervisors, and dealing with normal work stress. Dr. Anderegg also determined that Hanken was "limited but satisfactory" in understanding, remembering, and carrying out detailed instructions. Dr. Anderegg further determined that Hanken was seriously limited, but not precluded from dealing with stress of semi-skilled or skilled work. Lastly, Dr. Anderegg determined that Hanken had moderate limitation of restriction of activities of daily living and marked deficiencies of concentration, persistence, or pace.

On June 9, 2005, Dr. Jeffrey Wilharm also provided Hanken's counsel with a mental impairment questionnaire regarding Hanken's mental functional capacity. Dr. Wilharm has treated Hanken, as her psychiatrist, monthly since February, 1997. Dr. Wilharm had previously diagnosed Hanken with major depressive disorder. Dr. Wilharm listed the following signs and symptoms of Hanken's depressive disorder: Anhedonia, appetite disturbance with weight change, feelings of guilt or worthlessness, generalized persistent anxiety, difficulty thinking or concentrating, recurrent and intrusive recollections of a traumatic experience causing distress, persistent disturbances of mood or affect, perceptual or thinking disturbances, emotional lability, sleep disturbance, and emotional withdrawal or isolation. Dr. Wilharm also reported that Hanken was seriously

limited but not precluded in remembering work-like procedures, understanding and remembering very short and simple instructions, making simple work-related decisions, asking simple questions or requesting assistance, responding appropriately to changes in a routine work setting, and being aware of normal hazards and taking appropriate precautions. Dr. Wilharm further found that Hanken was unable to meet competitive standards for carrying out very short and simple instructions, maintaining attention for a two hour segment, maintaining regular attendance and being punctual, sustaining an ordinary routine without special supervision, working in coordination with or proximity to others without being unduly distracted, performing at a consistent pace without an unreasonable number and length of rest period, accepting instructions and responding appropriately to criticism from supervisors, and dealing with normal work stress. Dr. Wilharm also found that Hanken had no useful ability to function in completing a normal workday and workweek without interruptions from psychologically based symptoms. Dr. Wilharm also determined that Hanken was unable to meet competitive standards in understanding, remembering, and carrying out detailed instructions and setting realistic goals or making plans independently of others. Dr. Wilharm further determined that Hanken had no useful ability to function when dealing with stress of semi-skilled or skilled work. Lastly, Dr. Wilharm determined that Hanken had moderate limitation of restriction of activities of daily living and marked difficulties in maintaining social functioning and deficiencies of concentration, persistence, or pace.

On May 25, 2005 and June 13, 2005, Hanken visited Dr. Ellie Snavely, Ph.D., a licensed psychologist, for a neuropsychological evaluation. Hanken performed within the overall average to above average range on tests of verbal and nonverbal intelligence. However, Dr. Snavely noted that "[a]t times it was difficult for [Hanken] to express complex ideas orally. In contrast to these scores, general fund of information was well below average, which is markedly below expectations for someone of her educational and occupational background. This suggest poor retention for old well-learned information."

Dr. Snavely also noted that Hanken's psychomotor speed and speed of information processing were below average. Dr. Snavely concluded that Hanken's speed of thought processing was mildly impaired. Dr. Snavely assessed Hanken's emotional status using the Beck Depression Inventory-II test and the Beck Anxiety Inventory test. The test results placed Hanken in the range of persons with moderately severe depression and mild anxiety. In a letter dated November 14, 2005, Dr. Snavely provided the following review of her test results:

> A review of the report will show that there is psychometric, quantitative, evidence that [Hanken's] major depressive disorder is at the moderately severe level despite medication management with two antidepressants and regular psychotherapy every two weeks. There is additional quantitative evidence that there is an additional mild level of generalized anxiety. . . .
>
> While it is clear that [Hanken] performed very well on many of the cognitive measures, a review of the results also reveals that there were areas of significant weaknesses. The was an indication that retention of previously learned information is far below that expected in someone of her educational background and sociocultural exposure. Her speed of processing was quite slow, an impairment commonly seen in association with many psychiatric, as well as neurological, disorders. Observations of her responses during testing revealed that it was difficult for her to express complex ideas orally, a skill that would be expected to be quite fluent in some[one] of her educational level.

(Administrative Record at 411)

V. CONCLUSIONS OF LAW

A. ALJ's Disability Determination

The ALJ determined that Hanken is not disabled. In making this determination, the ALJ was required to complete the five-step sequential test provided in the social security regulations. *See* 20 C.F.R. § 404.1520(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140

(1987); *Page v. Astrue*, 484 F.3d 1040, 1042 (8th Cir. 2007); *Anderson v. Barnhart*, 344 F.3d 809, 812 (8th Cir. 2003). The five steps an ALJ must consider are:

> (1) whether the claimant is gainfully employed, (2) whether the claimant has a severe impairment, (3) whether the impairment meets the criteria of any Social Security Income listings, (4) whether the impairment prevents the claimant from performing past relevant work, and (5) whether the impairment necessarily prevents the claimant from doing any other work.

Goff v. Barnhart, 421 F.3d 785, 790 (8th Cir. 2005) (citing *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004)); *see also* 20 C.F.R. 404.1520(a)-(f). "If a claimant fails to meet the criteria at any step in the evaluation of disability, the process ends and the claimant is determined to be not disabled." *Eichelberger*, 390 F.3d at 590-91 (citing *Ramirez v. Barnhart*, 292 F.3d 576, 580 (8th Cir. 2002)).

"To establish a disability claim, the claimant bears the initial burden of proof to show that he [or she] is unable to perform his [or her] past relevant work." *Frankl v. Shalala*, 47 F.3d 935, 937 (8th Cir. 1995) (citing *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the residual functional capacity to perform a significant number of other jobs in the national economy that are consistent with claimant's impairments and vocational factors such as age, education, and work experience. *Id*. The RFC is the most an individual can do despite the combined effect of all of his or her credible limitations. 20 C.F.R. § 416.945. "'It is the ALJ's responsibility to determine a claimant's RFC based on all relevant evidence, including medical records, observations of treating physicians and others, and claimant's own descriptions of his [or her] limitations.'" *Tellez v. Barnhart*, 403 F.3d 953, 957 (8th Cir. 2005) (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001)).

The ALJ applied the first step of the analysis and determined that Hanken had not engaged in substantial gainful activity since her alleged onset date, October 28, 2004. At the second step, the ALJ concluded, from the medical evidence, that Hanken had the

following severe impairments "degenerative disc disease, sleep apnea, depression with anxiety features and a personality disorder." At the third step, the ALJ found that Hanken "[did] not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. 404, Subpart P, Appendix 1[, Regulations No. 4]." At the fourth step, the ALJ determined Hanken's RFC as follows:

> [Hanken] has the residual functional capacity to do a significant range of light work. She can occasionally lift 20 pounds and 10 pounds frequently. She can balance, stoop, crouch, kneel, crawl and climb, but only occasionally. She has no limitations in the use of upper extremities for gripping, grasping and fingering for light work activities and she can sit, stand and walk during a regular 8 hour workday with normal breaks and lunch. Mentally, she is mildly limited in activities of daily living and in social functioning. She would be moderately limited in concentration, persistence and pace. She would not be expected to have episodes of mental relapse corresponding in degree to deterioration in a work or work-like setting. She is able to do more than simple, routine, repetitive work that does not require close attention to detail. She should have only occasional contact with the public and would need to work at no more than a regular pace.

Using this RFC, the ALJ determined that Hanken met her burden of proof at the fourth step, because she was unable to perform her past relevant work. However, at the fifth step, the ALJ determined that Hanken, based on her age, education, previous work experience, and RFC, could work at jobs that exist in significant numbers in the national economy. Therefore, the ALJ concluded Hanken was "not disabled."

B. Hanken's Residual Functional Capacity

Hanken alleges that the ALJ erred in several respects. She argues that the ALJ erred by failing to give "good reasons" for discounting the opinions of her treating doctors, Drs. Anderegg and Wilharm, regarding her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms, perform at a consistent pace without an unreasonable number and length of rest periods, and deal with

normal work stress. Hanken further argues that the ALJ's decision is not supported by substantial medical evidence and is contrary to the opinions of both her treating and non-treating doctors. Lastly, Hanken contends that the ALJ erred in relying on the vocational expert's testimony because the hypothetical provided to the vocational expert did not completely or precisely state her limitations. Specifically, Hanken points out that the hypothetical did not contain any consideration of the ALJ's finding with regard to her mental RFC. Hanken requests that the court reverse the Commissioner's decision and remand it with directions to award benefits. Alternatively, Hanken requests this matter be remanded for further proceedings, including a proper evaluation of Drs. Anderegg's and Wilharm's opinions and a consideration of the medical evidence as a whole. Hanken further requests that the vocational expert be provided with a complete and precise hypothetical which includes all of her limitations on remand. The Commissioner argues that there is substantial evidence in the record as a whole which supports the ALJ's decision; and therefore, the decision should be affirmed.

1. The Treating Doctors' Opinions

Hanken argues that her treating doctors, Drs. Anderegg and Wilharm, were consistent in determining that she would have difficulty meeting competitive standards for completing a normal workday and workweek without interruption from psychologically based symptoms, performing at a consistent pace without an unreasonable number and length of rest periods, and dealing with normal work stresses. Hanken points out that both treating doctors also found that she had marked deficiencies in concentration, persistence, and pace. Hanken contends that the ALJ's findings conflict with Drs. Anderegg's and Wilharm's opinions. Hanken further argues that the ALJ failed to provide "good reasons" for discounting the opinions of her treating doctors.

The Commissioner argues that the opinions of Drs. Anderegg and Wilharm are not consistent. Specifically, the Commissioner maintains that Dr. Wilharm's opinions present much greater limitations on Hanken's mental functioning than the opinions of

Dr. Anderegg. The Commissioner further argues that the extreme limitations provided by both doctors are inconsistent with their treatment reports for Hanken and with her own self-reported activities of daily living. The Commissioner therefore argues that the ALJ properly discounted the opinions of Hanken's treating doctors, Drs. Anderegg and Wilharm.

In his decision, the ALJ did not consider Dr. Wilharm's assessment of Hanken's mental status to be controlling because he found it to be "exaggerated." The ALJ noted "since the alleged disability onset date, [Hanken] has not had frequent or even recurrent psychiatric hospitalizations of more debilitating symptoms and limitations."[10] The ALJ also noted that Dr. Wilharm's opinions were "exaggerated" because Hanken "can get out and about and has many normal activities of daily living and functioning."[11] Lastly, the ALJ found that Dr. Wilharm's progress notes did not support his assessment of Hanken's mental status.[12]

The ALJ also "rejected" the parts of Dr. Anderegg's assessment of Hanken's mental functioning which would make her "not competitively employable." The ALJ noted that Dr. Anderegg's psychotherapy notes only rated Hanken as having moderate depression with mild anxiety, sleeping problems, and loss of concentration. In his decision, the ALJ stated "[h]er consultations seemed to take on the appearance of sessions to handle more routine problems relating to the mental diagnoses and social relationships without frequent

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[10] *See* Administrative Record at 17-18.

[11] *See* Administrative Record at 18.

[12] *See* Administrative Record at 18 (in interpreting the progress notes, the ALJ found that Hanken's "affect was usually neutral or full, but sometimes restricted and vacant. She was always considered to be alert, oriented to time, place and person, cooperative with appropriate behavior, goal directed and well groomed. She showed normal or appropriate psychomotor activity and had no psychotic breaks. She apparently was not considered to be suicidal or homicidal. She had no 'lethality' and her judgment, insight and memory were 'OK.' He speech was goal directed. She was said to be a reliable patient functioning with an average intellect.").

relapses in her mental status."[13] The ALJ further determined that Dr. Anderegg's assessment of Hanken's limitations in April, 2005 were inconsistent with his findings in May, 2005. In his decision, the ALJ provided the following summary of a letter, dated April 15, 2005, containing Dr. Anderegg's conclusions regarding Hanken's limitations:

> He said that [Hanken] was capable of understanding and remembering simple instructions, procedures and locations. [Hanken's] purported problems with attention and concentration could be overcome by supervision and repetition on the job until instructions were well learned. On the basis of [Hanken's] subjective complaints of fatigue and low energy, she would work at a slower pace. Despite [Hanken's] clinical impression of ongoing depression and possible anxiety, she was reportedly capable of responding appropriately to changes in the work place, managing her own benefits, and interacting appropriately with supervisors, coworkers and the public.[14]

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[13] *See* Administrative record at 18.

[14] *Compare* Dr. Anderegg's letter, dated April 15, 2005, which provides:

> [Hanken] is capable of remembering and understanding simple instructions, procedures, and locations. She would require supervision and repetition until instructions were well learned to carry them out reliably due to problems with attention and concentration. Work pace is often slow due to problems with energy and fatigue. [Hanken] is capable of interacting appropriately with supervisors, co-workers, and the public. Her judgment is intact. She has the ability to respond appropriately to changes in the work place. She is capable of managing her own monthly cash benefits.

See Administrative Record at 352. *Compare also* Dr. Anderegg's assessment from a letter dated January 14, 2005, which provides:

> [Hanken] is capable of remembering and understanding simple instructions, procedures, and locations. She would require some repetition in order to remember more complex instructions. She has moderate problems with attention and concentration that would make it difficult for her to carry out

(continued…)

(Administrative Record at 19)

Lastly, the ALJ notes that Hanken underwent a neuropsychological evaluation by Dr. Snavely. In discussing Dr. Snavely's report, the ALJ determined that "[t]he report does not necessarily have the full reliability of assessments and progress notes from a treating source but does refute by test results [Hanken's] continuing allegations of significant loss of cognition, difficulties with poor memory and inability to have sustained concentration. Clearly, the tests show that these functions . . . have remained acceptable for competitive work."[15]

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[14](…continued)

> instructions. It also interferes with the pace of her work. She is vulnerable to stress and her ability to function decreases significantly when under even mild stress. She is capable of interacting appropriately with supervisors, co-workers, and the public. Her judgment is intact and she is able to respond appropriately to changes in the work place.

See Administrative Record at 257-58.

[15] *See* Administrative Record at 19. Apparently, the ALJ is arguing that Dr. Snavely's assessments call into question the opinions of Drs. Anderegg and Wilharm. However, Dr. Snavely also noted:

> While it is clear that [Hanken] performed very well on many of the cognitive measures, a review of the results also reveals that there were areas of significant weaknesses. The was an indication that retention of previously learned information is far below that expected in someone of her educational background and sociocultural exposure. Her speed of processing was quite slow, an impairment commonly seen in association with many psychiatric, as well as neurological, disorders. Observations of her responses during testing revealed that it was difficult for her to express complex ideas orally, a skill that would be expected to be quite fluent in some[one] of her educational level.

See Administrative Record at 411. This statement shows that Dr. Snavely concluded Hanken had difficulties with cognition, poor memory, and concentration. The ALJ did not (continued…)

The opinion of a treating physician:

> should not ordinarily be disregarded and is entitled to substantial weight. A treating physician's opinion regarding an applicant's impairment will be granted controlling weight, provided the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.

Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000) (citations omitted). The regulations provide that the longer the treating relationship between a physician and a patient, the more weight should be given to that treating physician's medical opinions. *See* 20 C.F.R. § 404.1527(d)(2)(I). Furthermore, an ALJ is "encouraged to give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist." *Singh*, 222 F.3d at 452. The regulations require an ALJ to give "good reasons" for giving weight to statements provided by a treating physician. *See* 20 C.F.R. § 404.1527(d)(2). The regulations also require an ALJ to give "good reasons" for rejecting statements provided by a treating physician. *Id.* "Although a treating physician's opinion is entitled to great weight, it does not automatically control or obviate the need to evaluate the record as a whole." *Hogan v. Apfel*, 239 F.3d 958, 961 (8th Cir. 2001) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1013 (8th Cir. 2000)). "The ALJ may discount or disregard such an opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions." *Id.*; *see also Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004) (an ALJ does not need to give controlling weight to a physician's RFC assessment if it is inconsistent with other substantial evidence in the record); *Cabrnoch v.*

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[15](…continued)
address this assessment and therefore, the Court finds that this is not substantial evidence which supports discounting the opinions of Drs. Anderegg and Wilharm. The Court will not address Dr. Snavely's neuropsychological evaluation further with regard to the opinions of Drs. Anderegg and Wilharm.

Bowen, 881 F.2d 561, 564 (8th Cir. 1989) (the resolution of conflicts of opinion among various treating and examining physicians is the proper function of an ALJ).

a. Dr. Wilharm

The Court, having reviewed the record, finds that the ALJ failed to provide "good reasons" for discounting the opinions of Hanken's treating doctor, Dr. Wilharm. First, the ALJ's assumption that someone with Hanken's symptoms and limitations, as described by Dr. Wilharm, should have "frequent or even recurrent psychiatric hospitalizations of more debilitating symptoms and limitations" is simply the ALJ's opinion. The ALJ does not point to any statute, regulation, legal authority, or medical evidence in the record to support this assumption. Next, the ALJ asserts that Hanken's activities of daily living are inconsistent with the limitations found by Dr. Wilharm. The ALJ relies on Hanken's "Personal Pain/Fatigue Questionnaire, dated January 11, 2005, and adult "Function Report," dated January 15, 2005, to show that her daily activities included driving her children to school, going grocery shopping, doing laundry, cooking, cleaning, and working on other household projects.[16] However, the ALJ fails to address Hanken's statements in both reports that she receives help from her parents, children, aunt and uncle, and former fiancé in cleaning, cooking, doing household chores, shopping, yardwork, driving her children to school and their activities, and laundry.[17] Lastly, the ALJ found that Dr. Wilharm's opinions were inconsistent with his own treatment notes. However, in his decision, the ALJ focuses on the portions of Dr. Wilharm's progress notes which generally describe Hanken's mood, attitude, and behavior at the therapy sessions. The ALJ fails to address the portions of Dr. Wilharm's progress notes which discuss Hanken's problems and how she had been dealing with those problems between their regular therapy sessions.

Furthermore, Dr. Wilharm was Hanken's treating psychiatrist since 1997. Dr. Wilharm treated Hanken for major depressive order. Dr. Wilharm opined that Hanken

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[16] *See* Administrative Record at 92-106.

[17] *See* Administrative Record at 95, 100.

was unable to meet the competitive standards for completing a normal workday or workweek without interruptions from psychologically based symptoms, performing at a consistent pace without unreasonable number and length of rest periods, and dealing with normal work stresses and having marked deficiencies in concentration, persistence, and pace. The opinion of a treating specialist is entitled to substantial weight. *Singh*, 222 F.3d at 452; *see also* 20 C.F.R. § 404.1527(d)(2)(I) (the longer the treating relationship between a physician and patient, the more weight should be given to that treating physician's medical opinions). Furthermore, the ALJ has a duty to fully and fairly develop the record in a social security disability review case. *Snead v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004). If the record contains medical evidence which is superior to the opinions of the treating doctor or the treating doctor offers inconsistent opinions, then the ALJ may disregard the treating doctor's opinion. *Hogan*, 239 F.3d at 961. However, the ALJ must give "good reasons" for disregarding a treating doctor's opinions. 20 C.F.R. § 404.1527(d)(2). The Court concludes that the ALJ did not fully or fairly develop the record with regard to Dr. Wilharm's opinions because he failed to consider the evidence in the record as a whole. The Court further concludes that the ALJ failed to give "good reasons" for disregarding Dr. Wilharm's opinions or show that the record contained superior medical evidence which outweighed Dr. Wilharm's opinions. The Court determines that it is appropriate to remand this case to allow the ALJ to further consider Dr. Wilharm's opinions and further develop the record with regard to crediting or discrediting Dr. Wilharm's opinions. The ALJ shall specifically address Dr. Wilharm's conclusions regarding Hanken being unable to meet the competitive standards for completing a normal workday or workweek without interruptions from psychologically based symptoms, performing at a consistent pace without unreasonable number and length of rest periods, and dealing with normal work stresses and having marked deficiencies in concentration, persistence, and pace.

b. Dr. Anderegg

Similarly, having reviewed the record, the Court finds that the ALJ failed to fairly and fully develop the record with regard to discounting the opinions of Dr. Anderegg, Hanken's treating psychologist. The ALJ discounted Dr. Anderegg's opinions because he found inconsistencies in his assessments. The ALJ noted that in his psychotherapy notes, Dr. Anderegg merely mentioned loss of concentration, not a marked deficiency in concentration. The ALJ also noted that Dr. Anderegg, in a letter dated April 15, 2005, stated Hanken's difficulty with concentration could be overcome by supervision and repetition on the job. Apparently, because Dr. Anderegg indicated that Hanken's concentration problems could be overcome by supervision and repetition on the job, the ALJ concluded such a determination was inconsistent with a finding of marked deficiency in concentration.

The record demonstrates that, from 1999 to May 18, 2005, Dr. Anderegg described Hanken's difficulties with concentration in a variety of ways, including "inability to concentrate," "poor concentration," "moderate problems with concentration," and "marked deficiency in concentration." The record further demonstrates that Dr. Anderegg consistently found that Hanken had problems with concentration. Dr. Anderegg and Dr. Wilharm both concluded that Hanken had marked deficiencies in concentration. In addition, Dr. Anderegg and Dr. Wilharm both concluded Hanken was unable to meet the competitive standards for completing a normal workday or workweek without interruptions from psychologically based symptoms, performing at a consistent pace without unreasonable number and length of rest periods, and dealing with normal work stresses.

Dr. Anderegg has treated Hanken since 1999. The opinion of a treating specialist is entitled to substantial weight. *Singh*, 222 F.3d at 452; *see also* 20 C.F.R. § 404.1527(d)(2)(I) (the longer the treating relationship between a physician and patient, the more weight should be given to that treating physician's medical opinions). As such, the ALJ is required to give "good reasons" for discounting the opinions of a treating doctor. *See* 20 C.F.R. § 404.1527(d)(2). While the ALJ points out that Dr. Anderegg

described the severity of Hanken's problems with concentration at different levels over her period of treatment, he did not address Dr. Anderegg's consistent findings with the conclusions of Dr. Wilharm, Hanken's other long-time treating doctor. The Court finds that the ALJ failed to fully and fairly develop the record with regard to the consistent opinions of Dr. Anderegg and Dr. Wilharm. Therefore, the Court determines that it is appropriate to remand this case to allow the ALJ to further consider Dr. Anderegg's opinions which are consistent with the opinions of Dr. Wilharm and further develop the record with regard to crediting or discrediting Dr. Anderegg's opinions. The ALJ shall specifically address Dr. Anderegg's conclusions regarding Hanken being unable to meet the competitive standards for completing a normal workday or workweek without interruptions from psychologically based symptoms, performing at a consistent pace without unreasonable number and length of rest periods, and dealing with normal work stresses and having marked deficiencies in concentration, persistence, and pace.

2. Specific Limitation Omitted in ALJ's Mental RFC

Hanken argues that the ALJ's mental RFC findings and the hypothetical question to the vocational expert failed to include any limitations on Hanken's ability to complete a normal workday and workweek without interruptions from psychologically based symptoms. Hanken points out that both Drs. Anderegg and Wilharm concluded she had this limitation. Hanken further points out that Dr. Westra, a non-examining psychological consultant, also concluded that she was moderately limited in her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms. Hanken contends that by failing to address this limitation, the ALJ failed to fairly and fully develop the record. The Commissioner argues that the ALJ properly determined Hanken's mental RFC based on all the credible evidence in the record.

An ALJ has the responsibility of assessing a claimant's RFC, and his or her assessment must be based on all of the relevant evidence. *Guilliams*, 393 F.3d at 803; *see also Roberts v. Apfel*, 222 F.3d 466, 469 (8th Cir. 2000) (same). Relevant evidence for

determining a claimant's RFC includes "'medical records, observations of treating physicians and others, and an individual's own description of his [or her] limitations.'" *Lacroix v. Barnhart*, 465 F.3d 881, 887 (8th Cir. 2006) (quoting *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004)). However, "RFC is a medical question, and an ALJ's finding must be supported by some medical evidence." *Guilliams*, 393 F.3d at 803 (citing *Masterson v. Barnhart*, 363 F.3d 731, 738 (8th Cir. 2004)).

The Court, having reviewed the record, concludes that there is relevant evidence in Hanken's medical records from her treating and non-treating doctors, Drs. Anderegg, Wilharm, and Westra, regarding a limitation on her ability to complete a normal workday and workweek without interruptions from psychologically based symptoms. The Court finds that the ALJ should have considered and discussed this limitation when determining Hanken's mental RFC. *See Guilliams*, 393 F.3d at 803 (an ALJ's RFC assessment must be based on all of the relevant evidence in the record). Accordingly, the Court finds that remand is appropriate for the ALJ to consider and more fully develop the record with regard to Hanken's limitation on the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms.

3. The ALJ's Hypothetical

Hanken argues that the ALJ provided an incomplete and imprecise hypothetical question to the vocational expert at the March 14, 2006 administrative hearing. The ALJ provided the vocational expert with two hypotheticals. The first hypothetical limited Hanken in the following manner:

> [S]he could lift 20 pounds occasionally, 10 pounds frequently; she could only occasionally balance, stoop, crouch, kneel, crawl or climb. She is able to do more than simple, routine, repetitive work but no close attention to detail. Only occasional contact with the public, no more than a regular pace.

The second hypothetical provided:

> [Hanken has the] same limitations as before. However, in this instance I'm going to indicate that she's going to need a slow pace for at least one-third of the day, at least two absences per month.

Hanken points out that, in his decision, the ALJ found her mental RFC to include mild limitations "in activities of daily living and in social functioning. She would be moderately limited in concentration, persistence and pace. She would not be expected to have episodes of mental relapse corresponding in degree to deterioration in a work or work-like setting." Hanken maintains that these limitations should have been included in the hypothetical question posed to the vocational expert. The Commissioner argues that the hypothetical question provided to the vocational expert was proper and included the impairments and restrictions that the ALJ found credible.

Hypothetical questions posed to a vocational expert, including a claimant's RFC, must set forth his or her physical and mental impairments. *Goff*, 421 F.3d at 794. "The hypothetical question must capture the concrete consequences of the claimant's deficiencies." *Hunt v. Massanari*, 250 F.3d 622, 625 (8th Cir. 2001) (citing *Taylor v. Chater*, 118 F.3d 1274, 1278 (8th Cir. 1997)). However, the ALJ does not need to include all impairments that are suggested by the evidence. *Goff*, 421 F.3d at 794. The ALJ may exclude from the hypothetical any impairment that the ALJ rejects as either "untrue or unsubstantiated." *Hunt*, 250 F.3d at 625 (citing *Long v. Chater*, 108 F.3d 185, 187 (8th Cir. 1997)).

The ALJ's mental RFC for Hanken provided that she was limited in activities of daily living and in social functioning, moderately limited in concentration, persistence and pace, and would not be expected to have episodes of mental relapse corresponding in degree to deterioration in a work or work-like setting. Because he did not include those limitations in the hypothetical question presented to the vocational expert, however, the Court finds that the ALJ's hypothetical did not contain all of Hanken's mental impairments and did not "capture the concrete consequences of the claimant's deficiencies." *See Hunt*,

250 F.3d at 625. Therefore, the Court finds that remand is appropriate and the ALJ shall include the foregoing limitations in his hypothetical question to the vocational expert.

C. Reversal or Remand

The scope of review of the Commissioner's final decision is set forth in 42 U.S.C. § 405(g) which provides in pertinent part:

> The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with our without remanding the cause for a rehearing.

42 U.S.C. § 405(g). The Eighth Circuit Court of Appeals has stated that:

> Where the total record is overwhelmingly in support of a finding of disability and the claimant has demonstrated his [or her] disability by medical evidence on the record as a whole, we find no need to remand.

Gavin v. Heckler, 811 F.2d 1195, 1201 (8th Cir. 1987); *see also Beeler v. Brown*, 833 F.2d 124, 127 (8th Cir. 1987) (finding reversal of denial of benefits was proper where "the total record overwhelmingly supports a finding of disability"); *Stephens v. Sec'y of Health, Educ., & Welfare*, 603 F.2d 36, 42 (8th Cir. 1979) (explaining that reversal of denial of benefits is justified where no substantial evidence exists to support a finding that the claimant is not disabled). In the present case, the Court concludes that the medical records as a whole do not "overwhelmingly support a finding of disability." *Beeler*, 833 F.2d at 127. Instead, the ALJ simply failed to fully and fairly develop the record for discounting certain opinions pertinent to Hanken's RFC and the hypothetical presented to the vocational expert. Accordingly, the Court finds that remand is appropriate.

VI. CONCLUSION

The Court concludes that this matter should be remanded to the Commissioner for further proceedings. On remand, the ALJ should develop the record fully and fairly, and address Drs. Anderegg's and Wilharm's opinions regarding Hanken being unable to meet the competitive standards for completing a normal workday or workweek without

interruptions from psychologically based symptoms, performing at a consistent pace without unreasonable number and length of rest periods, and dealing with normal work stresses and having marked deficiencies in concentration, persistence, and pace. The ALJ should also specifically address and more fully develop the record with regard to Hanken's limitation on the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms. Lastly, the ALJ should include his findings regarding Hanken's mental RFC in his hypothetical question to the vocational expert.

VII. ORDER

For the foregoing reasons, it is hereby **ORDERED**:

This matter is **REVERSED** and **REMANDED** to the Commissioner of Social Security pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings as discussed herein.

DATED this _____ day of October, 2007.

_____
JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA